



FH

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MKB/166155

PRELIMINARY RECITALS

Pursuant to a petition filed May 19, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Bureau of Long-Term Support in regard to Medical Assistance, a hearing was held on October 13, 2015, at West Bend, Wisconsin.

The issue for determination is whether the agency properly determined that the Petitioner no longer meets a nursing home level of care for the Katie Beckett program.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney Shirin Cabraal
6737 West Washington Street, Suite 3230
Milwaukee, WI 53214

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Michelle Green

Bureau of Long-Term Support
1 West Wilson

Madison, WI

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Washington County. She is 12 years old and has been eligible for Wisconsin Medicaid through the Katie Beckett program since March 1, 2006.

2. Petitioner's diagnoses include tetralogy of fallot, pulmonary hypertension, delayed gastric emptying, stenosis of left mainstem bronchus and ADHD. Functional limitations include endurance.
3. Petitioner requires tube feedings to prevent her from losing weight and to provide necessary fluids. Her J-tube is on a continuous drip at night.
4. Petitioner wears a CPAP at night. She requires respiratory monitoring which includes oxygen saturation checks daily and listening to her lungs. She does not use oxygen on a daily basis. She has a history of pneumonia.
5. Petitioner uses incontinence products at night as well as barrier pads in bed. She has bed-wetting episodes 5x/week and requires complete assistance with bedding changes.
6. Petitioner attends school. She requires assistance at school with medications and J-tube as needed. She does not participate in physical education classes. She has scheduled breaks throughout the school day due to fatigue. She is at grade level in school and receives assistance with math from a special education teacher.
7. Petitioner does not receive physical, occupational or speech therapy services. She communicates verbally. She is able to read and write. She is academically at grade level.
8. In February, 2014, Petitioner was seeing a counselor at [REDACTED]. As of February, 2015, she was no longer seeing a counselor.
9. In August, 2014, a psychological evaluation was completed and the Petitioner's IQ was determined to be 94.
10. On February 5, 2015, a functional screen report was completed for the Petitioner. It was noted that the Petitioner has a clinical diagnosis of an emotional disability that is expected to last one year or longer. It was noted that she has no behavioral problems. She was found to be independent with bathing, dressing, grooming, mobility and transfers. She was found to need assistance with eating and toileting. It was reported that she has no communication deficits, no learning issues and no social competency issues. It was also noted that her physical health or stamina level causes her to miss over 50% of school.
11. On May 26, 2015, a functional screen report was completed for the Petitioner. It was noted that the Petitioner is able to connect the connector to her J-tube and start the pump once it is set up. The remaining results are similar to previous functional screen findings.
12. On April 17, 2015, an application for Recertification for Katie Beckett Program was submitted to the agency on behalf of the Petitioner.
13. On May 12, 2015, the agency issued a notice to the Petitioner's parents that Petitioner's eligibility for the Katie Beckett program would end on June 12, 2015 due to not meeting the level of care criteria.

DISCUSSION

The purpose of the "Katie Beckett" waiver is to encourage cost savings to the government by permitting disabled children, who would otherwise be institutionalized, to receive MA while living at home with their parents. 42 U.S.C. 1396a(e)(3); 42 C.F.R. §435.225; Wis. Stat., §49.46(1)(d)4. The DDES is required to review Katie Beckett waiver applications in a five-step process. The first step is to determine whether the child is age 18 or younger and disabled. Petitioner has met this first standard. The second step is to determine whether the child requires a level of care that is typically provided in a hospital, nursing home, or ICF-MR. The agency determined that petitioner does not require this level of care. (The remaining three steps are assessment of appropriateness of community-based care, costs limits of community-based care, and adherence to income and asset limits for the child.)

The Department developed a policy manual which defines and describes childhood care levels. Institutional Levels of Care, Children's Long Term Support Programs in Wisconsin (updated February, 2011). There are four levels of care described in the manual.

A. Nursing Home LOC

The manual states as follows with regard to the NH LOC:

The child with a Nursing Home - Physical Disabilities (PD) Level of Care has a long-term medical or physical condition, which significantly diminishes his/her functional capacity and interferes with the ability to perform age appropriate activities of daily living at home and in the community. This child requires an extraordinary degree of daily assistance from others to meet everyday routines and special medical needs. The special medical needs warrant skilled nursing interventions that require specialized training and monitoring that is significantly beyond that which is routinely provided to children. The intensity and frequency of required skilled nursing interventions must be so substantial that without direct, daily intervention, the child is at risk for institutionalization within a nursing home.

A child may be assigned this level of care if the child meets BOTH of the criteria listed below for Physical Disability. The criteria are:

1. The child has a Diagnosis of a medical/physical condition resulting in needs requiring long term care services; and
2. The child requires skilled Nursing Interventions and/or has Substantial Functional Limitations requiring hands on assistance from others throughout their day.

In this case, there is no dispute that the Petitioner has a diagnosis resulting in needs requiring long-term care services. There is a dispute with regard to whether the Petitioner meets criteria #2.

There are two standards set forth in the manual for criteria #2. The Petitioner must meet one of the standards.

STANDARD I: Skilled Nursing Interventions PLUS Substantial Functional Limitations

The child must demonstrate BOTH a need for Skilled Nursing/Therapeutic Intervention PLUS TWO substantial functional limitations (A PLUS C, OR B PLUS C):

A. Needs and receives at least ONE Skilled Nursing Intervention listed below that must be performed daily and is reasonably expected to continue at least six months.

OR

B. Needs and receives at least TWO Skilled Nursing/Therapeutic Interventions listed below that must be performed at least weekly (or at the frequency noted below) and are both reasonably expected to continue at least six months.

AND

C. The child exhibits Substantial Functional Limitations when compared to age appropriate activities in at least TWO of the seven specific areas listed below that are reasonably expected to last at least one year.

STANDARD II: Substantial Functional Limitations

The child must have substantial functional limitations requiring daily direct hands on assistance in at least FOUR of the seven specific areas listed below that are reasonably expected to last for at least one year. There is no requirement of skilled nursing or therapeutic interventions for this Standard.

In this case, there is no dispute that the Petitioner needs and receives at least two skilled nursing/therapeutic interventions that are performed at least weekly and are expected to continue at least six months. The dispute is whether the Petitioner has substantial functional limitations in at least two of the seven areas listed.

The areas of functional limitations that must be analyzed are as follows:

1. Learning: A 30% (25% if the child is under one year of age) or greater delay or a score of at least 2 (1.5 if the child is under one year of age) standard deviations below the mean based on valid, standardized and norm referenced measures of aggregate intellectual functioning.

2. Communication: A substantial functional limitation in communication is defined as a 30% (25% if under one year) or greater delay or a standard score of at least 2 (1.5 if under one year) standard deviations below the mean on valid, standardized and norm referenced measures of BOTH expressive and receptive communication functioning.

3. Self Care: Refer to APPENDIX B. This Appendix describes the degree of deficit required in activities of daily living (self care) to meet a substantial functional limitation based on the child's age. Child must demonstrate a deficit in at least ONE of the following five areas of self care:

1. Bathing
2. Grooming
3. Dressing
4. Toileting
5. Eating

4. Mobility: Refer to APPENDIX B. This Appendix describes the degree of deficit required in mobility to meet a substantial functional limitation based on the child's age. The inability to run or to move long distances or between environments related to stamina or ease of movement is NOT a mobility deficit.

5. Social Competency: Refer to APPENDIX A. This Appendix lists deficits in social skills by age groups that demonstrate a substantial functional limitation in social competency.

6. Work: Needs direct, hands-on assistance every day to perform their job, significantly beyond the typical assistance needed by other employees with similar duties to complete their job duties. This applies only to children over 16 years or age.

7. Meal Preparation or Money Management: Refer to APPENDIX B. This Appendix describes the degree of deficit required in meal preparation or money management to meet a substantial functional limitation based on the child's age. This applies only to children over 18 years of age.

Appendix B: Activities in Daily Living - Substantial Functional Limitations

A substantial functional limitation is a child's inability to perform daily functions without extensive, hands-on assistance significantly beyond the age at which similar aged peers typically require such assistance. This assistance must be needed by the child to complete the task or function at all, rather than to complete the task better, more quickly, or to make the task easier.

In order for a limitation to be considered a substantial functional limitation, it must:

- be the direct result of the child's disability; and
- be exhibited most of the time; and
- result in the child needing extensive, direct, hands-on adult intervention and assistance beyond the level of intervention similar aged peers typically require in order to avoid institutionalization.

In addition, the child must:

- require this assistance consistently, and
- require this assistance for at least the next 12 months, and
- require this assistance to complete the function across all settings, including home, school and community.

A child has a substantial functional limitation in an activity of daily living category (e.g., Bathing, Grooming, etc.) if the child exhibits at least ONE of the specific substantial functional limitations listed under the category for the child's particular age group.

The Petitioner has a substantial functional limitation with Self-Care based on her need for assistance with eating and toileting. There is no evidence of a substantial functional limitation with Learning, Communication, Mobility or Social Competency. Work and Meal Prep/Money Management do not apply to the Petitioner due to her age.

Therefore, I must conclude that the Petitioner does not meet the nursing home level of care.

B. HOSPITAL LEVEL OF CARE

The manual states as follows with regard to the Hospital Level of Care:

A child with a Hospital – Physical Disabilities (PD) Level of Care has needs that are typically met in an in-patient medical hospital setting. The child's medical needs must be chronic, persistent and expected to last at least six months from the date of review. The skilled care needs cannot be acute and of a short-term duration. The frequency and complexity of the required skilled medical interventions must be so substantial that without these direct, continuous skilled medical interventions, the child is at risk of institutionalization within a long-term, in-patient medical hospital.

A child may be assigned this level of care if the child meets ALL THREE of the criteria listed below for Physical Disability. The criteria are:

1. The child needs Frequent and Complex Medical Care that require the use of equipment to prevent life-threatening situations; and
2. The child's complex skilled medical interventions are expected to persist for a specific Duration of time; and
3. The child's overall health condition must require Continuous Assessment of an Unstable And Life-Threatening Condition.

1. FREQUENT AND COMPLEX MEDICAL CARE

The child must need frequent and complex skilled medical interventions that require the use of equipment to prevent life-threatening situations. The child's health status must require BOTH of the following:

- A. The child requires provision of skilled medical care multiple times during each 24-hour period.

AND

- B. The Complex Skilled Medical Interventions includes ONE of the following items:

- Tracheostomy care
- Ventilator care
- IV access: peripheral or central lines for fluids, medications or transfusions. Does not include the use of a port.
- Oxygen: oxygen use includes only skilled tasks such as titration, deep suctioning and checking blood saturation levels.
- Total Parenteral Nutrition (TPN)
- Rehabilitation program for brain injury or coma (minimum of 15 hours per week).
- Dialysis: hemodialysis or peritoneal, in home or at clinic.

NOTE: The interventions listed above DO NOT include site care, as that is not a skilled medical task. Tasks that are performed only when necessary (PRN) and are not continuously required do not meet this Criterion.

The Frequent and Complex Medical Care Criterion must be met before considering Criterion 2: Duration. If the Frequent and Complex Medical Care Criterion is not met, the reviewer must stop here, but may consider levels of care other than Hospital, if appropriate.

In this case, there is some evidence that the Petitioner needs oxygen PRN. There is no evidence that she requires any of the other complex skilled medical interventions listed. Therefore, based on the evidence, the Petitioner does not meet the Hospital LOC.

C. ICF/MR – Developmental Disability Level of Care

With regard to a DD Level of Care, the manual states as follows:

A child with an ICF/MR - Developmental Disability (DD) Level of Care has a permanent cognitive disability, substantial functional limitations and a need for active treatment. The level of care criteria is based upon the child having needs similar to people in an intermediate care facility for children with mental retardation (ICF/MR). The intensity and frequency of required interventions to meet the child's functional limitations must be

so substantial that without the intervention, the child is at risk for institutionalization within an ICF/MR.

A child may be assigned this level of care if the child meets ALL THREE of the criteria listed below for Developmental Disability. The criteria are:

1. The child has a diagnosis of a Cognitive Disability that substantially impairs learning and that is expected to continue indefinitely; and
2. The child demonstrates Substantial Functional Limitations when compared to age appropriate activities that are expected to last a year or longer; and
3. The child has the Need for Active Treatment.

In order to meet criteria #1, the manual requires the following:

1. COGNITIVE DISABILITY

The child has a diagnosed Cognitive Disability that substantially impairs learning and that is expected to continue indefinitely. The child has a diagnosis that meets BOTH of the following:

A. The child must have a diagnosis of Cognitive Disability (i.e. Mental Retardation) or a similar diagnosis that substantially impairs learning.

The following diagnostic categories are considered diagnoses similar to Cognitive Disability or Mental Retardation for purposes of Criterion 1:

Autism Spectrum Disorders	Brain Injury or Brain Damage
Cerebral Palsy	Developmental Delay
Down Syndrome	Endocrine Disorders
Fetal Alcohol Syndrome/Effects	Genetic or Chromosomal Disorders
Metabolic Disorders	Prader Willi Syndrome
Rett's Syndrome	Seizure Disorder
Spina Bifida	Tuberous Sclerosis

AND

B. The diagnosis must have resulted in the child having substantial learning impairments as measured by ONE of the following:

1. A 30% (25% if the child is under one year of age) or greater delay in aggregate intellectual functioning, based on valid, standardized and norm referenced measures of aggregate intellectual functioning; OR
2. A score of at least 2 (1.5 if the child is under one year of age) standard deviations below the mean on valid, standardized and norm referenced measures of aggregate intellectual functioning.

In this case, the Petitioner has a diagnosis of ADHD. There is no evidence that her diagnosis substantially impairs learning. She is reported to be at grade level academically though she needs some additional assistance with math. The evidence does not support that she meets the criteria for the DD level of care.

D. Psychiatric Level of Care

With regard to a DD Level of Care, the manual states as follows:

The child with a Psychiatric Hospital - Severe Emotional Disturbance (SED) Level of Care has a long-term, severe mental health condition diagnosed by a licensed psychologist or psychiatrist. In addition, this child demonstrates persistent behaviors that create a danger to self or others, requiring ongoing therapeutic support in order to be able to live at home and in the community. The intensity and frequency of the required ongoing therapeutic support must be so substantial that without the support the child is at risk of inpatient psychiatric hospitalization.

A child may be assigned this level of care if the child meets ALL FOUR of the criteria listed below for Severe Emotional Disturbance. The criteria are:

1. The child has a Diagnosis of a mental health condition; and
2. The child's mental health diagnosis or symptoms related to the diagnosis have existed and are expected to persist for a specific Duration of time; and
3. The child is in need of Involvement with Service Systems related to mental health support; and
4. The child exhibits Severe Symptomology or Dangerous Behaviors at a specific intensity and frequency of required interventions such that without this direct, daily community-based intervention, the child is at risk for institutionalization within a psychiatric hospital.

The Petitioner has a diagnosis of ADHD. She was in counseling in 2014 to deal with issues of anger and frustration related to not being physically able to do the things she would like to do. As of February, 2015, the Petitioner is no longer in counseling and there is no evidence that she has any involvement with service systems related to mental health support or that she exhibits severe symptomology or dangerous behaviors. Therefore, I conclude she does not meet the criteria for the Psychiatric LOC.

In summary, based on the evidence presented, that the Petitioner is not, despite significant medical issues, eligible for the Katie Beckett program because she does not meet any level of care criteria.

CONCLUSIONS OF LAW

The agency properly determined that the Petitioner is not eligible for the Katie Beckett program because she does not meet any level of care criteria.

THEREFORE, it is

ORDERED

That the Petitioner's appeal is dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

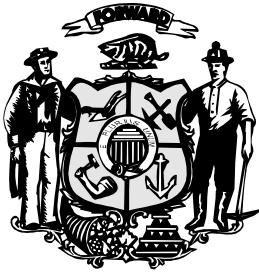
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 18th day of November, 2015

\sDebra Bursinger
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on November 18, 2015.

Bureau of Long-Term Support
Division of Health Care Access and Accountability
Attorney Shirin Cabraal